Supreme Court, U.S.
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No. 06-965

In The

# Supreme Court of the United States

THE CITY OF LUBBOCK, TEXAS,
and its MAYOR,

*Petitioners,*

v.

OSCAR RENDA CONTRACTING, INC.,

*Respondent.*

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

In *Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 674, 116 S.Ct. 2342, 135 L. Ed. 2d 843 (1996), the Court extended First Amendment protection to independent contractors having ongoing commercial relationships with governmental entities with a caveat that anticipated the First Amendment issue present in this petition:

> **Whether, and to what extent, the First Amendment protects an offeror, who has no ongoing commercial relationship with a governmental entity, if the entity rejects its offer in retaliation for exercising the right to free speech.**

Assuming the First Amendment affords protection under the above-referenced circumstances, this petition also questions:

> **Whether the appellate court applied the governing legal standard in determining that ORC sufficiently pleaded allegations implicating the requisite matters of public concern by alleging that the suit giving rise to this litigation "involved [ORC] asserting a First Amendment retaliation claim" which sought to "redress violations of federally protected rights?"**

## PARTIES TO THE PROCEEDINGS BELOW

The parties appearing in the underlying appellate proceeding were the plaintiff-appellant, Oscar Renda Contracting Inc. ("ORC"), and the defendants-appellees, the City of Lubbock, Texas, and Marc McDougal, in his capacity as mayor[1] (collectively called "Lubbock" or the "city"). Additional parties to the judgment rendered by the district court were the plaintiffs, John Beck ("Beck")[2] and Rudolph J. Renda.

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[1] David Miller became Lubbock's mayor during the pendency of the underlying appeal.

[2] Although Beck jointly filed a notice of appeal with ORC, he filed no appellate brief.

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## PETITION FOR A WRIT OF CERTIORARI

Lubbock asks for the issuance of a writ of certiorari facilitating a review of the judgment rendered below by the United States Court of Appeals for the Fifth Circuit.

## UNDERLYING OPINIONS

The opinion of the majority (A 1-14), whose judgment reversed the unpublished decision of the district court (A 18-41), and that of the dissent (A 14-17) appear at *Oscar Renda Contr., Inc. v. City of Lubbock*, 463 F.3d 378 (5th Cir. 2006).

## JURISDICTIONAL STATEMENT

Section 1331 of Title 28 of the United States Code provided the basis for invoking the district court's jurisdiction over the complaints that ORC brought against Lubbock under the provisions of 42 U.S.C. § 1983.

Because ORC timely appealed the district court's order that disposed of all claims, the appellate court had jurisdiction under the provisions of 28 U.S.C. § 1291. The Court may invoke jurisdiction under 28 U.S.C. § 1254(1) because Lubbock, who questions the propriety of the judgment rendered by the Fifth Circuit on 31 August 2006, filed its certiorari petition within ninety days of 12 October 2006, which was the rendition date of the order that denied its petition for rehearing (A 42-43).

## CONSTITUTIONAL & STATUTORY PROVISIONS

The constitutional and statutory provisions involved are:

1. The First Amendment, which provides that –

   > Congress shall make no law . . . abridging the freedom of speech, . . . and to petition the Government for a redress of grievances; and

2. Section 1983 of Title 42 of the United States Code which provides, in pertinent part, that –

   > [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

## STATEMENT OF THE CASE[3]

ORC, a construction company who specializes in public-works projects, first offered to perform work for Lubbock in answer to the city's request for proposals to

[3] Factual recitations made in footnotes of this section find support in public records, proffered *sans* objection, that are capable of being judicially noticed within the context of a 12(b)(6) proceeding. FED. R. EVID. 201; *cf. Davis v. Bayless*, 70 F.3d 367, 372 n.3 (5th Cir. 1995) (noting that federal courts may refer to matters of public record when deciding Rule 12(b)(6) motions).

construct improvements to its storm-water drainage system (the "Project") (A 2). ORC's $23.49 million offer was more than $2.2 million below the next bidder (*viz*, Utility Contractors of America ("UCA")) (A 2).

Because Texas law mandates making an award to the "lowest responsible" bidder, Lubbock's staff began analyzing the two lowest offers (*ibid*). As the end of the analysis neared, ORC, having learned of the staff's intent to recommend awarding the Project to UCA, requested a meeting with the staff (*ibid*).

During the meeting, Lubbock's staff voiced concerns about litigation that ORC brought against the El Paso County Lower Valley Water District (the "Water District") (*id.* at 2-3). In response, ORC explained that (1) the case involved its assertion of a First Amendment retaliation claim and a breach of contract claim; and (2) the jury returned a favorable verdict (*id.* at 3).[4] ORC also provided the staff with a copy of the appellate court's opinion which affirmed the judgment rendered on the breach of contract claim (*ibid*).[5]

ORC left the meeting believing that the staff no longer had concerns about its offer (*ibid*). But the staff, still having concerns, proposed to recommend awarding the Project to ORC only if the contractor executed an affidavit

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[4] ORC curiously made no mention of the jury's failure to find that the Water District "retaliated . . . because [contractor] exercised its constitutionally protected right to free speech" (R 12 [¶ 17], 379).

[5] The opinion makes only a passing remark concerning the irrelevancy of the nonfindings made in answer to the constitutional issues. *El Paso Cty. Lower Valley Water Dist. v. Oscar Renda Contr., Inc.*, Cause 08-01-00473-CV, 2004 WL 1637990, **1-3 (Tex. App. – El Paso 2004, pet. dism'd w.o.j.) (not designated for publ'n).

reaffirming its familiarity with the conditions and requirements of the Project and the applicable contractual provisions (*ibid*).

ORC accommodated the staff by executing an affidavit prior to the city council's consideration of the staff's conditional recommendation (*ibid*). But the affidavit did not allay the council's concerns about the business practices of ORC – a majority of the council voted to award the Project to UCA (*ibid*).

Believing that the City Council voted in an arbitrary and capricious manner by awarding the Project to the second lowest bidder, ORC brought suit against Lubbock (*ibid*). ORC's suit advanced claims under 42 U.S.C. § 1983 based on alleged violations of the First Amendment to the United States Constitution (*id.* at 3-4). More *specifically*, ORC alleged that Lubbock rejected its bid in retaliation for bringing a suit that "involved Renda asserting a First Amendment retaliation claim" which sought to "redress [the Water District's] violations of federally protected rights" (A 7).

Lubbock moved for dismissal under Rule 12(b)(6) (*id.* at 3). The district court granted Lubbock's motion because (1) ORC did not allege that the speech involved a matter of public concern; and (2) ORC had no ongoing commercial relationship with the city (*id.* at 3-4).

On appeal, Renda argued that the district court erred in dismissing its suit after adversely resolving both issues. The majority agreed. But Judge DeMoss dissented for three reasons. First, Judge DeMoss questioned whether the majority impermissibly expanded the Free Speech Clause by its extraction of a rule of law precluding –

> [a] city council of a city organized under the laws of any State [from] . . . deny[ing] the award of any contract for public services that is subject to competitive bidding to any corporation on the grounds that such corporation has previously filed suit against another governmental entity organized under the laws of the State alleging that such other governmental entity required the corporation to take actions contrary to local state law.

(*id.* at 14-15). Judge DeMoss also questioned the propriety of the majority's decision to recognize the accrual of a cause of action predicated on allegations of a governmental entity's infringement of the right of free speech afforded to a corporation such as ORC, who –

> (i) is not eligible to vote in any state or federal election; (ii) is not eligible to run for or hold any public office; (iii) is not eligible to be a member of any political party; (iv) is not eligible in Texas to make any contribution to any political candidate, and its ability to contribute funds to support a political party is severely limited; (v) cannot be an employee of any governmental entity; and (vi) is not counted as a "person" in any census, and therefore its existence has no influence on the composition of state legislative or congressional districts.

(*id.* at 15-16). Thirdly, Judge DeMoss questioned whether the water-district litigation that ORC brought in El Paso County was a matter of public concern to the citizens of Lubbock (*id.* at 16).

## REASONS FOR GRANTING THE PETITION

The majority of the appellate court vacated the order that dismissed ORC's complaint under the authority of Rule 12(b)(6) for two reasons. First was the majority's determination that "the First Amendment protects a contractor whose bid has been rejected by a city in retaliation for the contractor's exercise of [its] freedom of speech where the contractor had no pre-existing relationship with that city." *Renda*, 463 F.3d at 380. Second, the majority determined that ORC sufficiently pleaded allegations implicating the requisite matters of public concern by alleging that the suit giving rise to this litigation "involved Renda asserting a First Amendment retaliation claim" which sought to "redress violations of federally protected rights." *Id.* at 383.

The consequences of these determinations present matters of exceptional importance warranting review by the Court. The first has the effect of charging courts, both state and federal, with the burden of overseeing the government's exercise of its contractual power whenever a disappointed bidder alleges that the government rejected its bid in retaliation for an exercise of free speech. The second has the effect of abandoning this Court's interpretations of Rule 8 and Rule 12(b). Together, the effect of these determinations invite frivolous litigation; thereby burdening the courts and the limited resources of a taxpayer funded entity.

These determinations require correction, in part, because the first decision, which recognizes a claim previously unrecognized by this Court, is at odds with the decisions of other circuits; and, in part, because the second decision is inconsistent with the precedent of this Court.

Such circumstances authorize the issuance of a writ of certiorari.

### A. Whether (and, if necessary, to what extent) First Amendment protection extends to offerors who have no ongoing commercial relationship with the government?

At issue is the question of whether (and, if necessary, to what extent) First Amendment protection extends to offerors who have no ongoing commercial relationship with a governmental entity. This issue, a corollary of the seminal issue resolved in *Umbehr*, is the one that the Court reserved for a another day.

Today is the day the consideration of the issue. The issue requires resolution because (1) the Court previously identified the issue as one meriting future consideration; (2) the decision of the Fifth Circuit is at odds with the decision rendered by the Third Circuit in *McClintock v. Eichelberger*, 169 F.3d 812, 817 (3rd Cir. 1999); (3) cases presenting circumstances analogous to those present in *McClintock* and *Renda* are not anomalies; and (4) public policy does not warrant an extension of *Umbehr*.

#### 1. The issue is one of seminal importance.

*Umbehr* required the Court "to decide whether, and to what extent, the First Amendment protects independent contractors from the termination of at-will government contracts in retaliation for their exercise of the freedom of speech." *Id.* at 670. The issues arose when a county governing board terminated a trash hauling contract allegedly in retaliation for the hauler's public criticism of the board. *Id.* at 671-62. The hauler sued the board, alleging a

violation of his right of free speech. *Umbehr*, 518 U.S. at 671-72.

The trial court disposed of the hauler's suit by holding that the First Amendment protection afforded to an independent contractor such as the hauler was not coextensive with the protections afforded to public employees. *Id.* at 672. But the appellate courts disagreed. *Id.* at 672-73. In stating its disagreement, the Court emphasized the "limited nature" of its holding: "Because Umbehr's suit concerns the termination of a pre-existing commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship." *Id.* at 685.

This case, unlike *Umbehr*, presents an issue concerning the possibility of suits by a disappointed bidder for a new government contract who cannot rely on a preexisting commercial relationship with the government. As such, the case affords the Court an opportunity to decide the seminal issue left unaddressed by the Court's decision in *Umbehr*.

### 2. The decision of the majority is at odds with the decision of another circuit.

The first circuit court of appeals to address the issue left unanswered by *Umbehr* was the Third Circuit which refused, in a split decision, to extend First Amendment protection to contractors having no ongoing relationship with the government. *McClintock*, 169 F.3d at 817. The majority predicated its decision on an en banc decision wherein the court cautioned against extending First Amendment holdings if they would cause the judiciary to

"intrude itself into such traditional practices as contract awards by the government's executive, be it on a federal, state or local level." *Horn v. Kean*, 796 F.2d 668, 678 (3d Cir. 1986), *overruled on other grounds*, *Umbehr*, 518 U.S. at 673. Following *Horn*'s admonition, the majority decided to let this Court resolve the question reserved in *Umbehr*. *McClintock*, 169 F.3d at 817.

Unlike the majority, the dissenter (*viz*, Judge Roth) saw no need to postpone deciding the case based on the only *logical inference* to be drawn from *Umbehr*: "all independent contractors fall within the standard set forth in *Umbehr*. . . ." *McClintock*, 169 F.3d at 819-820 (Roth, J., dissenting). The dissent thus planted the seeds giving rise to an apparent split among the circuits.[6]

Without the constraint of *Horn*'s admonition, the seeds of division seemingly took root with the rendition of the underlying decision.[7] *Renda Contr.*, 463 F.3d at 385 (reading *Umbehr* as support for Judge Roth's conclusion that the First Amendment affords protection identical to that afforded individual job applicants when a governmental entity rejects a contractor's bid in retaliation of its

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[6] The First Circuit was the first to note the appearance of a split. *Prisma Zona Exploratoria de P.R., Inc. v. Calderon*, 310 F.3d 1, 7 n.3 (1st Cir. 2002) (noting the existence of an apparent split while resolving a case not needing to resolve "such large questions as to whether the *Elrod* line will continue to expand").

[7] *McClintock* and *Renda* are at odds with one another. But the decisions may not constitute an actual conflict because the *McClintock* court predicated its decision, in part, on a pleading defect. *Compare Renda*, 463 F.3d at 385 n.4, *with African Trade & Info. Ctr., Inc. v. Abromaitis*, 294 F.3d 355, 361 (2d Cir. 2002) (noting that the *McClintock* court "obviously addressed . . . the existence of the asserted right").

exercise of protected speech).[8] This apparent division thus warrants the issuance of certiorari to provide a uniform answer to the question of whether First Amendment protections extend to contractors who have no ongoing commercial relationships with the government. *See* SUP. CT. R. 10.

### 3. The issue is a recurring one.

Circumstances analogous to those present in *McClintock* and *Renda* are not anomalies; and neither decision is a judicial aberration. Cases giving deference to *McClintock*, while deciding related issues, include *Wishnatsky v. Rovner*, 433 F.3d 608, 612 (8th Cir. 2006) (recognizing that concerns about the judiciary's intrusion "into such traditional practices as contract awards by the government's executive" may lead to the development of a rule addressing the question reserved in *Umbehr*); *Mangieri v. DCH Healthcare Authority*, 304 F.3d 1072, 1076 (11th Cir. 2002) (arguably following the rule of law established in *McClintock*, which the court distinguished because there was a pre-existing relationship between the contractor and the government); *Webster v. Fulton County*, 283 F.3d 1254, 1257 (11th Cir. 2002) (arguably following *McClintock* while concluding that an independent contractor qualified to do

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[8] While conceding that the majority left unanswered the question concerning the possibility of First Amendment suits by disappointed bidders, the opinion cites the dissent of Justice Scalia, who holds no hope that the majority will decline to extend First Amendment protection to the contractor which has no prior relationship with the government, as support for its decision. *Renda*, 463 F.3d at 385-86. But "Cassandra-like predictions in dissent are not a sure guide to the breadth of the majority's ruling." *Abromaitis*, 294 F.3d 355, 362 n.5 (2d Cir. 2002).

the work upon which it bids "states a claim for violation of Section 1981 when that contractor ... alleges that a governmental entity refused to award a contract to the contractor in retaliation for the contractor's filing of a lawsuit charging the governmental entity with a custom or policy of disparate-treatment racial discrimination that was applied against the contractor in violation of Section 1981"); *Abromaitis*, 294 F.3d at 361-62 (holding that a qualified-immunity defense was viable because the possibility, if any, of "§ 1983 claims where plaintiffs did not have the requisite ongoing relationship with the government" was not a "clearly established" right); and those reaching a result akin to that reached in *McClintock* include *Prisma Zona Exploratoria de P.R., Inc. v. Calderon*, 162 F.Supp.2d 1, 8 (D. P.R. 2001) (dismissing the First Amendment claim of an applicant or bidder for a government contract), *aff'd on other grounds*, 310 F.3d 1 (1st Cir. 2002); *Housey v. McNeal*, Cause 05-CV-74697-DT, 2006 U.S. Dist. LEXIS 26274, **12-13 (E.D. Mich. 2006) (summarily disposing of a First Amendment claim brought by a "disappointed bidder"); *Allstate Transp. Co. v. SEPTA*, Cause 97-1482, 2000 U.S. Dist. LEXIS 3831, **66-67 (E.D. Pa. 2000) (citing *Umbehr* and *McClintock* as support for the disposition of retaliation claims brought under Section 1983 by a bidder who had complaints concerning proposals that were unrelated to its prior relationship with the governmental entity); *Anderson v. County of Mendocino*, 2005 Cal. App. Unpub. LEXIS 3615, **14-15 (Cal. App. 2005) (reversing a judgment rendered on a jury verdict based on Umbehr's failure to extend First Amendment protection to public contractors with no pre-existing relationship with the government); *accord Ervin v. Dunlap*, 33 F.Supp.2d 1, 7 (D. D.C. 1997) (recognizing that

First Amendment protections may not extend to disappointed bidders).

Contrary to the holding of *McClintock* is the decision at issue and the decision of at least one district court in the Second Circuit. *See A.F.C. Enterprises, Inc. v. New York City Sch. Constr. Auth.*, Cause CV-98-4534, 2001 U.S. Dist. LEXIS 24447, **54-57 (E.D. N.Y. 2001). The division among the circuits thus calls for resolution – just as the division among the circuits called for a resolution when the Court granted certiorari to resolve recurring questions concerning the extent of protection to afford independent contractors, who have ongoing commercial relationships with the government, when the government terminates contracts in retaliation for their exercise of free speech. *See Umbehr*, 518 U.S. at 672-73.

**4. Public policy warrants no extension.**

Governmental entities have long had discretion in awarding contracts. *Umbehr*, 518 U.S. at 674. Governmental entities enjoyed such discretion because the government, as an employer, enjoys broader powers than those enjoyed by the government as a sovereign. *Waters v. Churchill*, 511 U.S. 661, 671, 114 S.Ct. 1878, 128 L. Ed. 2d 686 (1994) (plurality opinion).

While the instant decision does not abrogate such discretion, the determination effectively constitutes a judicial intrusion upon the executive's management functions. Governmental entities would be burdened with scrutinizing every purchase, to ensure there was no exclusion of someone who might claim that the exclusion was retaliatory. The appellate court's determination also creates a Hobson's choice: The determination will deter

governmental entities from determining whether a bidder is "responsible" in the first instance or when, as in this case, they make such determinations, then litigation will undermine their ability to perform public services.

Because contracting is an exercise of administrative rather than sovereign power, governmental entities will bear an increase in litigation expenses because the first opportunity to achieve a disposition will likely present itself at the summary judgment stage. While such expense may be bearable, the Court must determine whether "the inconvenience of bearing [the expense] is outbalanced by the degree of abridgment of supposed First Amendment rights (of corporate shareholders, for the most part) that would occur if the burden were not imposed." *Umbehr*, 518 U.S. 668, 697-98 (Scalia, J., dissenting).

### B. Whether the appellate court correctly applied the governing legal standard when determining the sufficiency of the requisite public concern allegations.

This petition evolved from a pretrial dismissal for failure to state a claim upon which a court may grant relief. As such, the appeal was subject to de novo review under the same substantive test used to determine whether the complaint stated a legally cognizable claim. *See Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996).

The test authorizes a dismissal for failure to state a claim when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In making that statement, the Court's concern was

the legal sufficiency of the facts alleged. *Ibid.* Accordingly, the Court rejected the assertion that the complaint "failed to set forth specific facts to support its general allegations of discrimination" without suggesting that conclusory allegations satisfy the test; rather, the Court held that the alleged facts gave fair notice of the claim. *Id.* at 47.

When passing on the sufficiency of the statement of the claim for relief, courts accept as true the allegations of the complaint. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 122 L. Ed. 2d 517 (1993). But no rule mandates the acceptance of "a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 92 L. Ed. 2d 209, 106 S.Ct. 2932 (1986); accord *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992) (noting that neither conclusory allegations nor unwarranted deductions of fact can establish the sufficiency of the statement of the claim for relief). Likewise, no rule mandates an assumption of facts not alleged. *Associated Gen. Contr. of Cal., Inc. v. Carpenters*, 459 U.S. 519, 526, 103 S.Ct. 897, 74 L. Ed. 2d 723 (1983); *accord Southland Sec. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004) (noting that a court need not strain to find inferences favorable to the plaintiff).

Here, ORC alleged that Lubbock violated the First Amendment by basing its decision to award the Project to UCA because ORC exercised its rights to petition the government and speak out regarding official misconduct occurring while constructing improvements for the Water District (A 32-35). To recover on the claim, ORC has to sustain a basic pleading threshold: allege facts, which if proven, which show that constitutionally protected speech provided the basis for its First Amendment claim. *Cf.*

*Connick v. Myers*, 461 U.S. 138, 146-47, 103 S.Ct. 1731, 20 L.Ed.2d 708 (1983) (considering whether the speaker expressed himself "as a citizen upon matters of public concern"); *accord Kirkland v. Northside I.S.D.*, 890 F.2d 794 (5th Cir. 1999) (holding that the speech must touch upon an issue of public concern in the public employment context).

Whether the subject matter of the prior lawsuit touches on a matter of public concern as it relates to Lubbock and its actions presents a question of law. *See Markos v. City of Atlanta, Tex.*, 364 F.3d 567, 570 (5th Cir. 2004). In making this determination, holdings of this Court mandate consideration of "the content, form, and context of a given statement, as revealed by the whole court record." *Connick*, 461 U.S. at 147-48.

The district court's analysis of the complaint resulted in its determination that ORC failed to make the requisite allegations (A 35). But the appellate court held otherwise because the complaint alleged that the suit giving rise to this litigation "involved Renda asserting a First Amendment retaliation claim" which sought to "redress violations of federally protected rights" (A 7).

The appellate court's holding is erroneous because the allegations relied upon constitute nothing other than a "legal conclusion" which is not a substitute for the requisite factual allegations. *See Papasan*, 478 U.S. 265 at 286. In the absence of the requisite factual allegations, the district court had "the power to insist upon some specificity in pleading before allowing a potentially massive actual controversy to proceed." *A.G.C.*, 459 U.S. at 528 n.17. ORC provided some specifics in its response to the Rule 12(b)(6) motion: the controversy between ORC and

the Water District involved a matter of public concern because the Water District told ORC to violate the municipal ordinances of the City of Socorro (A 35).

The allegation failed to cloak ORC with First Amendment protection simply because its activities addressed a matter of public concern. Indeed, no authority supports the conclusion that all speech by a public employee on a matter of public concern is constitutionally protected. Such a litmus test contravenes the rationale underlying the Court's decision in *Garcetti v. Ceballos*, 126 S.Ct. 1951, 164 L. Ed. 2d 689 (2006).

*Garcetti* concerned free speech claims brought by a deputy district attorney who alleged that he suffered retaliatory employment actions after he challenged the veracity of an affidavit used to obtain a critical search warrant. *Id.* at 1955-56. The district court summarily disposed of the claims – finding that the First Amendment afforded no protection for speech made pursuant to the duties of his employment. *Id.* at 1956. The Ninth Circuit, somewhat like the Fifth Circuit in this instance, reversed – finding that speech thought to constitute governmental misconduct was "inherently a matter of public concern" falling within the purview of the First Amendment regardless of whether the assistant district attorney made his challenge pursuant to his official duties. *Garcetti v. Ceballos*, 361 F.3d 1168, 1174 (9th Cir. 2004), *rev'd*, 126 S.Ct. at 1962. But the Court rejected the appellate court's decision – noting that a rule requiring judicial supervision in lieu of managerial supervision found no support in the Court's precedent. *Garcetti*, 126 S.Ct. at 1960-62.

A fair-minded reading of ORC's complaint reveals only a dispute arising within the context of ORC's duties to

construct improvements for the Water District. This case thus presents, as the order of Judge Cummings' illustrates, circumstances requiring reversal because ORC's complaint does not state a claim under the governing standards. Accordingly, this Court should issue certiorari to facilitate the order's reinstatement.

## CONCLUSION

For the reasons stated, Lubbock asks the Court to render an order that grants (1) this petition, and (2) any other relief deemed appropriate under law or equity.

Respectfully,

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463 F.3d 378

**UNITED STATES COURT OF APPEALS**
**For the Fifth Circuit**

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No. 05-10836

---

OSCAR RENDA CONTRACTING, INC.; ET AL

Plaintiffs

OSCAR RENDA CONTRACTING, INC.; JOHN C. BECK

Plaintiffs – Appellants

VERSUS

THE CITY OF LUBBOCK TEXAS; MARC MCDOUGAL, in his official capacity as Mayor for injunctive relief

Defendants – Appellees

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Appeal from the United States District Court
For the Northern District of Texas, Lubbock
5:05-CV-29

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(Filed August 31, 2006)

Before DAVIS, BARKSDALE and DeMOSS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Appellant, Oscar Renda Contracting, Inc. ("Renda") appeals the district court's order dismissing its suit for failure to state a claim. The principal issue in this case is whether the First Amendment protects a contractor whose

bid has been rejected by a city in retaliation for the contractor's exercise of freedom of speech where the contractor had no pre-existing relationship with that city. Although the Supreme Court expressly reserved this question in *Board of County Commissioners v. Umbehr*, 518 U.S. 668, 116 S.Ct. 2342 (1996), the Court's analysis in that case when read along with *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729 (1990), persuades us that the absence of a prior relationship would not preclude the contractor's claim. We vacate the order dismissing this case and remand it to the district court for further proceedings.

## I.

Appellant, Renda, is a construction company based in Roanoke, Texas, and specializes in public works projects. The Appellee, City of Lubbock ("the City"), is an incorporated municipality in Texas. The City requested bids for construction of improvements to its storm drainage system – the "South Lubbock Drainage Improvements Project." Renda submitted the lowest bid by more than $2.2 million. The next lowest bidder was Utility Contractors of America ("UCA"). Under Texas law, the City is required to award the contract to the "lowest responsible bidder."[1]

After becoming aware that City officials had recommended that the City award the contract to UCA, Renda requested a meeting with the City staff officials. During the meeting, the City officials apparently stated that they knew Renda had previously filed a lawsuit against the El Paso Water District ("Water District suit") and was

[1] Tex. Loc. Gov't Ann. § 252.043(d)(1) (Vernon Supp.2005).

awarded damages, and they expressed concern that Renda was "lawsuit happy." Renda explained to the City staff officials its reasons for filing the lawsuit, and Renda left the meeting believing it had dispelled any concerns the City officials had regarding the lawsuit. The City officials recommended the acceptance of Renda's bid proposal, but only on the condition that Renda execute an affidavit reaffirming its familiarity with the conditions and requirements of the construction project and the applicable contractual provisions. Renda complied with the demand and signed the affidavit on the same day the City Council voted on the contract.

Despite the signed affidavit, the Council awarded the contract to UCA, by a 4-3 vote, claiming that they had reservations concerning Renda's business practices. Renda, on the other hand, alleged that the City's real reason for denying its bid stemmed from Renda's lawsuit against the Water District. Renda alleged in Paragraph 17 of its petition that it was explained to City representatives, including the attorneys from the City Attorneys' Office, that Renda asserted a First Amendment retaliation claim and a breach of contract claim in the Water District case. Renda also alleged that it prevailed in this suit.

Renda filed suit in the district court seeking damages and other relief because the City retaliated against it for exercising its First Amendment rights.[2] The district court granted the City's motion to dismiss the First Amendment retaliation claim because (1) Renda did not allege that the speech involved a matter of public concern *to the relevant city of Lubbock, Texas;* and (2) Renda did not have

[2] Renda asserted other claims which are not before us on appeal.

a pre-existing commercial relationship with the City. On appeal, Renda argues that the district court erred in resolving both issues against it and in dismissing its suit.

## II.

### A.

We review dismissals under Rule 12(b)(6) *de novo*. *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir.2004) (citing *Hamilton v. United Healthcare of Louisiana, Inc.*, 310 F.3d 385, 388 (5th Cir.2002)). "In doing so, we accept as true the well-pleaded factual allegations in the complaint." *Id.* (citing *Hermann Holdings Limited. v. Lucent Technologies Inc.*, 302 F.3d 552, 557 (5th Cir.2002)). The dismissal should be upheld only if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim which entitles them to relief. *Id.* (quotations and citations omitted). Subsumed within this standard, is the requirement that the plaintiff's complaint be stated with enough clarity to enable a court or an opposing party to determine whether a claim is sufficiently alleged. *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir.1989).

### B.

Renda argues first that the district court erred in concluding that it failed to adequately allege that Renda's speech – the Water District lawsuit – involved a matter of public concern. To state a First Amendment retaliation claim, an employee suing his employer must establish four elements: (1) the employee must suffer an adverse employment decision; (2) the employee's speech must involve a *matter of public concern;* (3) the employee's interest in

commenting on matters of public concern must outweigh the defendant's interest in promoting efficiency; and (4) the employee's speech must have motivated the employer's adverse action. *Kinney v. Weaver*, 367 F.3d 337, 356 (5th Cir.2004) (en banc) (emphasis added). The Supreme Court explained in *Connick v. Myers*, 461 U.S. 138, 147-48 (1983), that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."

As stated earlier, the district court concluded that the plaintiffs failed to plead that the prior lawsuit against El Paso Water District involved a matter of public concern because the suit had nothing to do with a public issue in Lubbock and thus did not address a matter of public concern *to Lubbock – "the relevant community"*.

The City relies on the language in a number of Supreme Court cases and cases from this court requiring proof that the speech is a matter of concern in the "community." *See, e.g., Connick*, 461 U.S. at 146 (1983) (stating that the speech should fairly relate to a "matter of political, social, or other concern to the community"); *Alexander v. Eeds*, 392 F.3d 138, 143 (5th Cir.2004) (quoting *Markos v. City of Atlanta*, 364 F.3d 567, 572 (5th Cir.2004)) (concluding that the speech at issue was not public speech because "no one could reasonably argue that [the][] complaints were made against a backdrop of widespread debate *in the community*" but were merely matters of private concern) (emphasis added); *Tompkins v. Vickers*, 26 F.3d 603, 607 (5th Cir.1994) (stating that the plaintiff's speech was made "against a backdrop of widespread debate *in the Greenville community* regarding the art program and other aspects") (emphasis added).

The City tracks the position taken by the district court and argues that while allegations in the Water District suit of wrongdoing by El Paso officials might be a matter of public concern in El Paso, it would be of little interest to the residents of the Lubbock community.

We have found no cases expressly discussing whether the speech at issue must be a matter of public concern in the community where the retaliation and plaintiff's damages occur. However, the district court's affirmative answer to this question is inconsistent with the result in this circuit's *en banc* decision in *Kinney*. 367 F.3d 337.

In that case we permitted plaintiffs to assert claims for First Amendment retaliation even though the location of the protected activity and the place where the retaliatory activity occurred were hundreds of miles apart. *Kinney*, 367 F.3d 337. At argument, the City agreed that *Kinney* was dispositive of this issue.

This conclusion is also more consistent with our reading of the Supreme Court's cases that public concern has a broader meaning than that given by the City. As the Supreme Court in *City of San Diego v. Roe*, 543 U.S. 77, 83-84, 125 S.Ct. 521, 525-26 (2004), stated "[t]hese cases make clear that public concern is something that is a subject of legitimate news interest." We conclude, therefore, that the district court erred in concluding that Renda's complaint failed to allege that the Water District lawsuit was a matter of "public concern in the community" because the protected activity (the lawsuit) occurred in El Paso rather than Lubbock, where the retaliation occurred.

C.

The City also argues that Renda's allegation that its bid was rejected because it filed a lawsuit against the El Paso Water District is insufficient to raise an inference that the lawsuit is a matter of public concern. If the petition alleged only that Renda filed a lawsuit we would agree with the City. In this circuit an employee's suit against her employer is not considered per se a matter of public concern. If the lawsuit is only a matter of personal interest to the employee, it is not considered a matter of public concern. *See Rathjen v. Litchfield*, 878 F.2d 836, 842 (5th Cir.1989) (citing *Day v. South Park Indep. Sch. Dist.*, 768 F.2d 696, 700 (5th Cir.1985)).

But Renda alleged in Paragraph 17 that its suit "involved Renda asserting a First Amendment retaliation claim and a breach of contract claim." Renda also alleged that its suit sought to "redress violations of federally protected rights." Together, these allegations are sufficient under a 12(b)(6) standard to put the City on notice that its El Paso suit involved more than Renda's personal interests and implicated matters of public concerns.

We, therefore, conclude that Renda's petition was sufficient to put the City on notice that its El Paso suit involved matters of public concern.

D.

We turn next to Renda's argument that the district court erred in concluding that unless a contractor has a prior relationship with a governmental entity, the contractor cannot state a First Amendment claim against that

entity for rejecting the contractor's bid in retaliation for the contractor's exercise of its right to free speech.

The Supreme Court has held in a governmental employment context that no prior relationship is required before an employee is permitted to assert a claim for First Amendment retaliation. More particularly, the Court in *Rutan* held that a government entity's refusal to hire an employee for engaging in protected activity supports a claim for First Amendment retaliation. 497 U.S. at 74 (relying in large part upon *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), and applying it to the patronage context); *see also Pierce v. Tex. Dep't of Criminal Justice*, 37 F.3d 1146, 1149 (5th Cir.1994). The Supreme Court has explained that the protection from political patronage is to "prevent[] the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate, or to not believe and not associate." *Rutan*, 497 U.S. at 76. Similarly, this court has held that the focus of permitting claims for First Amendment retaliation should be based upon "the government's duty not to punish protected speech, not the citizen's supposed 'right' to government patronage." *Kinney*, 367 F.3d at 357.

In *Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir.1995), this court extended the same First Amendment protection enjoyed by employees to contractors dealing with a governmental entity. Blackburn, who was the owner of a wrecker service, brought suit against the City of Marshall under 42 U.S.C. § 1983, alleging in part that the City retaliated against him for his protected First Amendment activities by revoking his permission to use the city radio frequency. This action effectively rendered Blackburn ineligible to participate in the rotation list for

wrecker service. *Id.* at 929-30. The district court dismissed Blackburn's suit for failure to state a claim, reasoning that Blackburn was not entitled to assert First Amendment retaliation claims because he was a contractor and not a public employee. *Id.* at 930. We reversed the dismissal, holding that independent contractors enjoy First Amendment protections against governmental interference with free speech. *Id.* at 929.

One year later, in *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), the Supreme Court of the United States agreed with this court's holding in *Blackburn*. In *Umbehr*, a trash hauler lost an existing contract with a county after the contractor criticized the county commissioners. *Id.* at 671. Consistent with this court's analysis, the Supreme Court rejected the argument that independent contractors should not be afforded First Amendment rights along with public employees. *Id.* at 676. The Court declined to draw a bright line between employees and contractors granting First Amendment protection to employees and withholding this protection from contractors. Instead, the Court applied the *Pickering* balancing test where the interests of the government in regulating speech is balanced against the interest of the contractor to First Amendment protection. So rather than withholding all First Amendment protection from contractors, the Court's approach was to use the familiar *Pickering* balancing test to accommodate the differences between employees and contractors and determine the extent of First Amendment protection that would be afforded to contractors. The seven-justice majority concluded:

> We therefore see no reason to believe that proper application of the *Pickering* balancing test cannot

> accommodate the differences between employees and independent contractors. There is ample reason to believe that such a nuanced approach, which recognizes the variety of interests that may arise in independent contractor cases, is superior to a bright-line rule distinguishing independent contractors from employees. The bright-line rule proposed by the Board and the dissent would give the government *carte blanche* to terminate independent contractors for exercising First Amendment rights. And that bright-line rule would leave First Amendment rights unduly dependent on whether state law labels a government service provider's contract as a contract of employment or a contract for services, a distinction which is at best a very poor proxy for the interests at stake.

*Id.* at 678-79 (citing *Political Patronage in Public Contracting*, 51 U. Chi. L.Rev. 518, 520 (1984) ("[N]o legally relevant distinction exists between employees and contractors in terms of either of the government's interest in using patronage or of the employee or contractor's interest in free speech.") (other citations omitted)).

Because the underlying lawsuit involved a contractor's loss of an existing contract, the Supreme Court reserved for another day the question of whether an independent contractor with no pre-existing commercial relationship would be permitted to assert a First Amendment retaliation claim. *Id.* at 686.[3]

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[3] The same day, the Supreme Court, in a companion opinion, extended to a corporate independent contractor the right to protection from political patronage under the First Amendment. *See O'Hare Truck Serv. Inc., v. City of Northlake*, 518 U.S. 712 (1996).

The Third Circuit is the only circuit to address the question the Supreme Court reserved in *Umbehr*. *See McClintock v. Eichelberger*, 169 F.3d 812, 816-17 (3d Cir.1999). Ten years before *Blackburn* was adopted by the Supreme Court in *Umbehr*, the Third Circuit held that independent contractors possess no right to pursue claims for First Amendment retaliation unless the contractor is able to prove the existence of a property interest. *Horn v. Kean*, 796 F.2d 668, 674 (3d Cir.1986) (*en banc*), *overruled by Umbehr*, 518 U.S. at 673.

Even though the Supreme Court expressly overturned the reasoning of *Horn* in *Umbehr*, 518 U.S. at 673, a divided panel of the Third Circuit declined to extend *Umbehr's* protections to independent contractors who possess no pre-existing contractual relationship with the government. *McClintock*, 169 F.3d at 816-17.[4]

In dissent, Judge Roth criticized the *McClintock* majority for construing the *Umbehr* Court's decision not to address First Amendment retaliation suits by bidders as categorically denying claims by contractors without a pre-existing commercial relationship with the government. *Id.* at 818. Judge Roth reasoned that the Supreme Court simply did not address the issue because it was not presented in the case. As Judge Roth pointed out, nothing in

[4] There is some question as to whether the discussion of the right of a contractor without a pre-existing relationship with the government to First Amendment protection is dicta since the court first stated that the only argument the contractor made was based on having a prior relationship. *See McClintock*, 169 F.3d at 817 (stating "[w]e . . . will not entertain this argument as appellants did not plead it as the basis for relief in their complaint," and "[i]n any event, even if we entertained appellants' argument that without regard for their status under *Umbehr* and *O'Hare* they are entitled to relief, we would affirm.").

the Supreme Court's opinion suggested that it would not permit retaliation claims by those without a pre-existing relationship with the government entity. Citing *Perry* and *Rutan*, Judge Roth reasoned:

> Given these holdings and the reasoning that the Court employed in reaching them, it is logical to conclude that all independent contractors fall within the standard set forth in *Umbehr*, in *O'Hare*, and in the government employee cases. The opposite inference, that this precedent should be understood to bar suits by contractors who are applicants for new contracts, is not logical. *Id.* at 820.

Judge Roth concluded that the Supreme Court's holding in *Rutan* made the inference "inescapable." *Id.* Since First Amendment rights have been afforded to individuals applying for employment with the government, no different result should be afforded to bidders applying for "employment" with the government under a bidding arrangement. *See id.*

We agree with Judge Roth's dissent in *McClintock*. Reading *Umbehr* and *Rutan* together, the Court's reasoning strongly supports her conclusion that the contractor – like the individual job applicant – is protected by the First Amendment if its bid is rejected in retaliation of its exercise of protected speech.

Justice Scalia's dissent supports this reading of the majority opinion. Although he strongly disagrees with the majority's approach, he holds out no hope that in the next case, the majority will decline to extend First Amendment protection to the contractor which has no prior relationship with the government:

> The quoted statement in *Umbehr*, [reserving the question of whether contractors without a pre-existing relationship are entitled to First Amendment protection], invites the bar to believe, therefore, that the Court which declined to draw the line of First Amendment liability short of firing from government employment (*Elrod* and *Branti*), short of nonhiring for government employment (*Rutan*), short of termination of a government contract (*Umbehr*), and short of *denial* of a government contract to someone who had a "pre-existing commercial relationship with the government" (*O'Hare*) may take a firm stand against extending the Constitution into every little thing when it comes to denying a government contract to someone who had *no* "pre-existing commercial relationship." Not likely; in fact, not even believable.

*Umbehr*, 518 U.S. 668, 709, 116 S.Ct. 2361, 2373 (Scalia, J., dissenting).

For the reasons stated above, the Court's analysis in *Umbehr* leads us to conclude that the Court would not require a contractor to have a prior relationship with a governmental entity before being able to assert a First Amendment claim and the district court erred in dismissing the suit on this ground.

## III.

For the reasons stated above, we conclude that plaintiff stated a claim for a First Amendment violation. We do not however express any opinion on the ultimate outcome of this case. We vacate the district court's order dismissing this suit and remand this case to the district court for further proceedings.

VACATED and REMANDED.

ENDRECORD

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DeMOSS, Circuit Judge, dissenting:

Because the majority opinion unnecessarily expands the law in an area in which I believe we have already strayed too far from the text of the Constitution and because affirming the district court's decision would promote the resolution of Appellant-Renda's state law claims in the more appropriate state court forum, I respectfully dissent.

## A.

The portion of the First Amendment of the U.S. Constitution relevant to this case reads, "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. Although I disagree with the premise that the Fourteenth Amendment was intended to make the First Amendment applicable to the States, necessitating the transformation of the quoted text into "Neither Congress nor any State or State entity shall make any law abridging the freedom of speech," I am forced to recognize, at a minimum, this judicial interpretation. What I cannot recognize is the majority's transformation of the ten words quoted above into the following passage:

> A city council of a city organized under the laws of any State shall not deny the award of any contract for public services that is subject to competitive bidding to any corporation on the grounds that such corporation has previously filed suit against another governmental entity

> organized under the laws of the State alleging that such other governmental entity required the corporation to take actions contrary to local state law.

The majority deems this transformation necessary per the Supreme Court precedent it cites, but I tend to agree with Justice Scalia that the precedent is questionable, and I am dismayed that the majority feels the need to expand upon it. I also have serious doubts about the majority's treatment of the term "public concern" in the free speech context.

First, as mentioned above, the Free Speech Clause contains but ten words. The power to amend those words lies with the Congress and the States. U.S. CONST. art. V. Although I do not here go so far as to accuse the Supreme Court of usurping the power to amend, I agree with Justice Scalia that "when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, [the courts] have no proper basis for striking it down." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting).

Second, neither the Supreme Court precedent cited by the majority nor any other Supreme Court case I have found has recognized a cause of action accruing in a corporation that alleges that its right to free speech has been infringed by a governmental entity. And I see no reason to continue to expand the law in the free speech context. Further, as a corporation, Renda (i) is not eligible to vote in any state or federal election; (ii) is not eligible to run for or hold any public office; (iii) is not eligible to be a member of any political party; (iv) is not eligible in Texas

to make any contribution to any political candidate, and its ability to contribute funds to support a political party is severely limited; (v) cannot be an employee of any governmental entity; and (vi) is not counted as a "person" in any census, and therefore its existence has no influence on the composition of state legislative or congressional districts. While I realize that the Supreme Court has recognized some sort of free speech right in corporations with respect to the promotion, advertisement, and sale of their respective products and services, I do not see any good reason, and the majority has not provided one, to expand the free speech right of corporations in this context where even the Supreme Court has yet to do so.

Third, whatever the controversy between the El Paso Water District, Renda, and the City of Socorro was, I am convinced it was not a matter of public concern to the citizens of Lubbock County, some 450 miles away from El Paso County. In this vein, I note that Renda's home office is in the suburbs of Dallas/Forth Worth in Denton County, some 300 miles from Lubbock County and in the opposite direction from El Paso County.

Again, expansion of free speech rights in this case is inappropriate because we have already lost sight of the text of the Free Speech Clause; corporations have not previously been given the same broad free speech protection as individuals; and the notion of "public concern" is here stretched beyond recognition.

**B.**

I also dissent because I am bothered by the effect of the majority's decision on the course of the litigation between Renda and the City of Lubbock. I believe that

affirming rather than reversing Judge Cummings's decision would better serve the interest of federalism in providing the best forum for the resolution of the real controversy between Renda and the City of Lubbock. It appears from the pleadings and Judge Cummings's statement of the facts that the dollar amount of Renda's bid was less than the dollar amount of the winning bid. Under Texas law, a city contract for a civil engineering construction project must be awarded to the "lowest responsible bidder." TEX. LOCAL GOV'T CODE § 252.043(d)(1). To me, the real controversy in this case is whether the City of Lubbock met that obligation; and that issue should be decided in state court, where the court would be best able to determine, under Texas law, the scope of the City's discretion in determining which bidders qualify as "responsible" bidders.

For the foregoing reasons, I would affirm the decision of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

| | | |
|---|---|---|
| OSCAR RENDA CONTRACTING, INC.; RUDOLPH J. RENDA; and JOHN C. BECK, Plaintiffs, v. THE CITY OF LUBBOCK, TEXAS and MARC McDOUGAL, in his Official Capacity as Mayor for Injunctive Relief, Defendants. | ) | Civil Action No. 5:05-CV-029-C |

**ORDER**

(Filed May 6, 2005)

Came on for consideration the following:

(1) Defendants' Motion to Dismiss & Supporting Memorandum filed February 22, 2005, and Plaintiffs' Response thereto, filed March 14, 2005;

(2) Defendants' Motion for Leave to File Defendants' Response to Shareholder's Motion to Dismiss and Reply to Plaintiffs' Response to Defendants' Motion to Dismiss and Brief in Support Thereof, filed April 1, 2005, and Plaintiffs' Objections thereto filed April 7, 2005; and

(3) Plaintiffs' Motion for Leave to File Sur-Reply, filed April 7, 2005.

In Plaintiffs' Response filed March 14, 2005, Plaintiff Rudolph J. Renda has agreed to not pursue any claims

against Defendants; thus, the Court **DISMISSES** the claims of Rudolph J. Renda.

Defendants' Motion for Leave to File Defendants' Response to Shareholder's Motion to Dismiss and Reply to Plaintiffs' Response to Defendants' Motion to Dismiss is **GRANTED**. Plaintiffs' Motion for Leave to File Sur-Reply is **GRANTED**.

After considering all the relevant arguments, Defendants' Motion to Dismiss is **GRANTED in part** and **DENIED in part**.

## I.
## PROCEDURAL HISTORY

On November 22, 2004, Plaintiffs, Oscar Renda Contracting, Inc. ("ORC"); Rudolph J. Renda ("Renda"); and John C. Beck ("Taxpayer"), filed suit against Defendants, the City of Lubbock ("the City") and Marc McDougal, in his official capacity as Mayor ("Mayor"), in the 72nd Judicial District Court of Lubbock County, Texas. Plaintiffs sought a temporary restraining order from the state court. The state court heard and denied the request. Plaintiffs then non-suited their state court case on February 1, 2005, and filed their Original Complaint ("Complaint") in this Court on the same date. Within Plaintiffs' Original Complaint was a request for this Court to enter a temporary restraining order. This Court issued an order denying Plaintiffs' Request for Temporary Restraining Order on February 2, 2005. Defendants filed a Motion to Dismiss on February 22, 2005. Plaintiffs filed a Response to Defendants' Motion to Dismiss on March 14, 2005. Defendants filed a Motion for Leave to File Defendants' Response to Shareholder's Motion to Dismiss and Reply to

Plaintiffs' Response on April 1, 2005. Plaintiffs then filed Plaintiffs' Objections to Defendants' Motion for Leave to File Reply and Reply and Plaintiffs' Motion for Leave to File Sur-Reply on April 7, 2005.

## II.
## BACKGROUND

ORC is a corporation authorized and licensed to do business in the State of Texas with its principal place of business located in Roanoke, Texas. Renda is an individual and part owner in ORC and is a resident of Colleyville, Texas. Beck is an individual property taxpayer of the City of Lubbock and is a resident of the City of Lubbock, Lubbock County, Texas.

The City is an incorporated municipality within the Northern District of Texas. The Mayor of Lubbock is on the City Council and is sued only in his official capacity, for the purposes of injunctive relief. None of the City Council members is named as a defendant in this suit.

ORC, a utility construction general contractor, specializes in public works projects. ORC was the low bidder for the construction of the South Lubbock Drainage Improvements Project, Main Truck Line (Storm Water), Bid #001-04/VK ("the Project"). ORC's bid was $23,487,764.00. The next lowest bidder, Utility Contractors of America, Ltd. ("UCA"), submitted its bid at $25,699,455.50 and was awarded the contract. ORC and the City dispute whether ORC was the lowest "responsible" bidder.

Plaintiffs allege that ORC and certain city staff members met on September 16, 2004, to address the City's concerns with ORC and that the City's main concern was

that ORC was "lawsuit happy" and that the City specifically pointed to a previous lawsuit ORC was involved in, *ORC v. El Paso Lower Valley Water District.* Plaintiffs allege that the El Paso litigation was "a motivating or main factor for not awarding the Project/Contract to ORC." *See* Compl. at ¶ 26. Further, Plaintiffs allege that the city staff members recommended to the City Council that the Project be awarded to ORC as the lowest responsible bidder, provided that ORC execute an affidavit regarding the Project.

The City Council met on September 28, 2004, to award the Project. During that meeting, a city councilman made the following comment regarding the necessity that ORC sign an affidavit: "It's like asking a bank robber, do you swear you will not rob any more banks?" Plaintiffs allege that the affidavit was then used against ORC by the City Council as a means of raising a question of whether ORC could be considered "responsible." During that meeting, the City Council awarded the Project to UCA in a 4 to 3 decision. Plaintiffs allege that the City Council voted in an arbitrary and capricious manner to award the project to the second lowest bidder. ORC submitted a written Bid Protest/Request for Reconsideration. Plaintiffs allege that because the council awarded the bid to UCA, ORC has lost net profit revenues and has had its name and reputation tarnished.

Plaintiffs seek to recover monetary damages and injunctive relief. Plaintiffs advance their claims under 42 U.S.C. § 1983 based on alleged violations of the First, Fifth and Fourteenth Amendments to the United States Constitution. Plaintiffs also seek relief for alleged violations of Chapter 252 of the Texas Local Government Code, TEX. LOCAL GOV'T CODE §§ 252.001 *et seq.*, and a declaratory

judgment under the Texas Declaratory Judgment Act. TEX. CIV. PRAC. REM. CODE §§ 37.001 *et seq.* Finally, Plaintiffs seek attorneys' fees under 42 U.S.C. § 1988.

## III.
## MOTION TO DISMISS STANDARDS

Defendants have moved for dismissal under both Rule 12(b)(1), lack of subject matter jurisdiction, and Rule 12(b)(6), failure to state a claim for which relief can be granted. FED. R. CIV. P. 12(b)(1) and (6). When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits. *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977). This requirement prevents a court without jurisdiction from prematurely dismissing a case with prejudice. *Id.* The court's dismissal of a plaintiff's case because the court lacks subject matter jurisdiction is not a determination on the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction. *Id.* Though not specifically delineated in Defendants' Motion to Dismiss, it appears that the basis for asserting a Rule 12(b)(1) jurisdictional attack is Defendants' contention that certain Defendants do not have standing to bring the Chapter 252 state law claims.

Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow a party to challenge the subject matter jurisdiction of the district court to hear a case. FED. R. CIV. P. 12(b)(1). Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented

by undisputed facts plus the court's resolution of disputed facts. *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996). Thus, in examining a Rule 12(b)(1) motion, the district court is empowered to consider matters of fact which may be in dispute. *Williamson v. Tucker*, 645 F.2d 404, 413 (1981). The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *McDaniel v. United States*, 899 F. Supp. 305, 307 (E.D. Tex. 1995). Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980).

Defendants' main arguments in their Motion to Dismiss appear to be advanced under Rule 12(b)(6) grounds. Under Federal Rule of Civil Procedure 12(b)(6), motions to dismiss raise the defense of failure to state a claim upon which relief may be granted. This motion is appropriate when the defendant or counter-plaintiff attacks the complaint because it fails to state a legally cognizable claim. In other words, a motion to dismiss an action for failure to state a claim "admits the facts alleged in the complaint, but challenges plaintiff's rights to relief based upon those facts." *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1137 (5th Cir. 1992). The test for determining the sufficiency of a complaint under Rule 12(b)(6) was set out by the United States Supreme Court in *Conley v. Gibson:* "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" 355 U.S. 41, 45-46 (1959); *see also Grisham v. United States*, 103 F.3d 24, 25-26 (5th Cir. 1997). The *Conley* test is a rigorous standard, but subsumed within it is the requirement that

the plaintiff state its case with enough clarity to enable a court or an opposing party to determine whether a claim is sufficiently alleged. *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989). In a Rule 12(b)(6) motion to dismiss, the allegations of the complaint must be taken as true. *Grisham*, 103 F.3d at 25. Further, the allegations in the complaint should be construed favorably to the pleader. *Oppenheimer v. Prudential Sec., Inc.*, 94 F.3d 189, 194 (5th Cir. 1996). This requirement is consistent with the well-established policy that the plaintiff be given every opportunity to state a claim. *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977). A plaintiff, however, must allege specific facts, not conclusory allegations. *See Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989). Conclusory allegations and unwarranted deductions of fact are not admitted as true. *See Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992). Nor will a court strain to find inferences favorable to the plaintiff. *Southland Securities Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004).

"Normally, in deciding a motion to dismiss for failure to state a claim, courts must limit their inquiry to facts stated in the complaint and the documents either attached to or incorporated in the complaint." *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996). Matters of public record also may be considered. *Cinel v. Connick*, 15 F.3d 1338, 1343 n.6 (5th Cir. 1994) (a court may properly consider matters of public record without converting a Rule 12(b)(6) motion to a motion for summary judgment); *Davis v. Bayless*, 70 F.3d 367, 372 n.3 (5th Cir. 1995) ("Federal courts are permitted to refer to matters of public record when deciding a 12(b)(6) motion to dismiss.").

## IV.
## DISCUSSION

Plaintiffs assert various claims under 42 U.S.C. § 1983 and Texas law. The Complaint can be characterized as first alleging violations of the United States Constitution by way of (1) violations of the Fifth and Fourteenth Amendments because ORC allegedly had a liberty interest and property interest in its good name that was violated when a member of the City Council implied that ORC was like bank robbers, and (2) violations of the Free Speech and Right to Petition Clauses of the First Amendment when the City allegedly retaliated against ORC because ORC had used the court system in a previous lawsuit.

Next, Plaintiffs seek a declaratory judgment pursuant to Texas law. Specifically, "Plaintiffs ask that this Court declare that the contract awarded to UCA is null and void . . . under provisions of § 252.061 of the Texas Local Government Code and the Texas Declaratory Judgment Act, that the contract awarded to UCA was made without compliance with Chapter 252 of the Texas Local Government Code, that it is void and that the performance thereof, including the payment of any money by the City to UCA under the contract is enjoined." *See* Compl. at ¶ 41.[1]

[1] The Complaint also sought a temporary restraining order. The Court, by Order dated February 2, 2005, denied the request for a temporary restraining order.

## A. CONSTITUTIONAL CLAIMS[2]

Section 1983 does not create substantive rights, but allows individuals to seek vindication for "federal rights conferred elsewhere." *Albright v. Oliver*, 510 U.S. 266, 271 (1984). To establish a cause of action under 42 U.S.C. § 1983, a plaintiff must "allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). The second prong of a § 1983 action, under color of state law, does not appear to be in dispute. *See* Reply at 3 ("While Lubbock raises no question concerning the [C]omplaint's articulation of acts under color of state law, the [C]ity questions the [other] assertions."). Thus, at the Rule 12(b)(6) level, the Court's sole question is whether ORC has properly alleged facts to state a violation of a right secured by the Constitution. *See Resident Council of Allen Parkway Village v. United States Dept of Hous. & Urban Dev.*, 980 F.2d 1043, 1050-51 (5th Cir. 1993).

To establish § 1983 liability against a municipality, a plaintiff must show that the protected right was violated by the execution of the municipality's policy or custom. *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694 (1978) The theory of respondeat superior is insufficient to establish a municipality's liability in § 1983

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[2] Plaintiff Taxpayer is not advancing any constitutional claims but is instead advancing a claim under Texas bidding statutes. As stated above, Plaintiff Renda has agreed to the dismissal of his claims. Thus, only Plaintiff ORC is advancing constitutional claims under section 1983.

cases. *Id.* Here, the only reference in the Complaint to a policy or practice is where Plaintiffs allege:

> The City of Lubbock has a custom, practice, or policy of violating the Texas Local Government Code procurement statutes and committing retaliation for engaging in activity that is protected by the United States Constitution. The decisions, which form the basis of this lawsuit, were made by the Highest-Ranking-Official Policy-Making Authority of the City of Lubbock, which is the Lubbock City Council. Therefore, the decision to retaliate against ORC because of [sic] ORC had engaged in protected activity, became the policy of the City of Lubbock.

Compl. at ¶ 37. Thus, from the wording of the Complaint, Plaintiff ORC is specifically alleging that a policy of retaliation exists because the Lubbock City Council made the decision not to award the contract to ORC – thereby implementing a policy which, Plaintiff alleges, was retaliation for engaging in a protected activity. *Id.* As the paragraph quoted above indicates, the Complaint only alleges a policy or custom with regard to retaliation (i.e., Plaintiffs' First Amendment retaliation claim).[3] Importantly, and

[3] Although Plaintiffs attempt to allege a policy or practice with regard to alleged violations of the Texas Local Government Code, such allegations cannot form the basis for a § 1983 cause of action. *See, e.g., Castellano v. Fragozo*, 352 F.3d 939, 942 (5th Cir. 2003) (en banc) (to proceed under 42 U.S.C. § 1983 such a claim must rest upon a denial of rights secured under federal and not state law); *San Jacinto Savs. & Loan v. Kacal*, 928 F.2d 697, 701 (5th Cir. 1991) ("Violation of a state statute is not actionable under § 1983."); *Calhoun v. Hargrove*, 312 F.3d 730, 734 (5th Cir. 2002) ("A claim for relief under § 1983 must allege the deprivation of a right secured *by the Constitution or laws of the United States* by a defendant acting under the color of state law.") (emphasis added).

highly relevant as a matter of properly pleading a § 1983 claim, the Complaint does not allege a municipal policy or custom regarding alleged violations of Fifth and Fourteenth Amendment claims in regard to violating a protected liberty or property interest in a good name. *See id.* The Complaint is in fact silent on whether any custom or policy exists to violate an offeror's interest in a good name. Thus, this defect alone is grounds for dismissal of said Fifth and Fourteenth Amendment liberty interest claim under Rule 12(b)(6).

### 1. Fifth and Fourteenth Amendment Claims[4]

Although not required to be analyzed by the Court because the Complaint fails to allege that a municipal policy or custom exists to defame the good name of bidders, *see Monell*, 436 U.S. at 694, the Court will discuss Plaintiff ORC's alleged violations of the Fifth and Fourteenth Amendments to the United States Constitution and whether ORC has otherwise alleged a viable claim for which relief may be granted. In a § 1983 Due Process Claim, the plaintiff must "first identify a life, liberty, or property interest protected by the Fourteenth Amendment and then identify a state action that resulted in a deprivation of interest." *Blackburn v. City of Marshall*, 42 F.3d 925, 935 (5th Cir. 1995).

Plaintiffs concede in their Response that under Texas substantive law, a low bidder does not have a property

[4] ORC clarifies that it understands that the Fifth Amendment applies to federal actors but "the Fourteenth Amendment made Fifth Amendment protections applicable to the states." *See* Resp. at 1.

right in the contract. *See* Resp. at 8 ("ORC agrees that a low bidder, under Texas substantive law, does not have a *property* right in the contract.") (emphasis in orig.). It is well settled that "the sufficiency of the claim of entitlement must be decided by reference to state law." *Bishop v. Wood,* 426 U.S. 341, 344 (1976). Moreover, no process is due where no protected property interest exists. *See Bd. Regents v. Roth,* 408 U.S. 464, 469 (1976).[5]

However, ORC alleges that it has been defamed and stigmatized and asserts it has a *liberty* interest in its good name and reputation pursuant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[6] Stigma imposed by a public official alone does not infringe on a liberty interest. *Paul v. Davis,* 424 U.S. 693, 710-711 (1976). An interest in reputation alone does not implicate a "liberty" or "property" interest sufficient to invoke due

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[5] It does not appear from the Complaint that Plaintiffs are attempting to raise a procedural due process claim. The Complaint can be regarded as silent on allegations relating to procedural inadequacies. The Court notes that Plaintiffs' Original Complaint indicates that procedural process was provided. ORC or its representative was able to address the City Council at the time the contract award was made, *see* Pl. Compl. at ¶ 21 and Ex. 1, City staff prior to the award of the contract, *see id.* at ¶¶ 15-20, and the City Council again upon Council hearings regarding ORC's challenge to the prior awarding of the contract to UCA. *See id.* at ¶¶ 26-27 and Ex. 1.

[6] Plaintiff mentions an Equal Protection Clause violation in passing in the Sur-Reply, *see* Sur-Reply at 16 ("and that ORC was treated differently than other similar-situated [sic] contractors . . . in violation of the Equal Protection Clause"). However, Plaintiff fails to allege an Equal Protection Clause violation as a cause of action in the Original Complaint. A response cannot be used to argue claims not included in the complaint. Plaintiffs are required to plead a "short and plain statement of the claim showing that the pleader is entitled to relief" Fed. R. Civ. P. 8(a)(2). The Court will not strain to make out an Equal Process Clause claim on the facts alleged in the Complaint.

process protection. *See Cinel v. Connick*,15 F.3d 1338, 1343 (5th Cir. 1994) (citing *Thomas v. Kippermann,* 846 F.2d 1009, 1010 (5th Cir. 1988)). A § 1983 plaintiff must "show stigma plus an infringement of some other interest." *Blackburn,* 42 F.3d at 935 (citing *San Jacinto Savs. & Loan v. Kacal,* 928 F.2d at 701).

Plaintiffs cite *Blackburn v. City of Marshall,* a case that applied the benefit analysis to a due process claim. 42 F.3d 925, 931 (5th Cir. 1995). In *Blackburn,* the city removed a towing company from the list police officers called to remove vehicles from accident scenes because the company had complained about the bidding process for a separate towing service. *Id.* at 929-30. Importantly, the court in *Blackburn* did not find that the *bidding process* was a benefit protected by the Fourteenth Amendment. *Blackburn,* 42 F.3d 925. Thus, Plaintiffs may not rely upon *Blackburn* as holding that the bidding process was a benefit protected by the Fourteenth Amendment. As stated, Texas law has repeatedly held that a bidder has no property interest in the contract.

In order to state a claim, ORC must also allege that the public official has made "concrete, false assertions of wrongdoing on the part of the plaintiff." *Id.* at 936 (italics omitted). The Complaint fails to meet this requirement and thus fails to state a claim for deprivation of a liberty interest. The Complaint does not actually assert that the communication was false, only that it was improper. *See* Compl. at ¶ 34 ("the totally improper statement"). According to the Complaint, the councilman did not in fact call ORC and its employees bank robbers. The Complaint itself states: "One of the City Council members went so far as to *compare the affidavit,* which was requested by the City, with robbing a bank, by stating: its [sic] like asking a bank

robber, do you swear you will not rob any more banks." *See* Compl. at ¶ 23 (emphasis added). Even if the next conclusory sentence in the Complaint were taken in a light most favorable to ORC, *see Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982) (the Court need not accept conclusory allegations in the complaint as true), it still does not allege that the councilman made "*concrete*, false assertions of wrongdoing on the part of the plaintiff" *Blackburn*, 42 F.3d at 935 (emphasis added). Rather, the statement was phrased as an analogy and the Complaint itself states as much by using the terms "compare" and "implication." *See* Compl. at ¶ 23. Plaintiffs' Response goes on to use the term "analogize" when describing the councilman's remark. *See* Resp. at 17 ("and to analogize ORC's conduct to the conduct of criminal bank robbers"). Plaintiff's one-page argument within the Response addressing ORC's Fourteenth Amendment claim fails to cite any case law to support a cause of action for a liberty interest in a bidder's good name and reputation under allegations similar to the allegations in the Complaint.

As discussed above, the Complaint fails to allege a municipal policy or custom regarding infringements of liberty or property interests in a good name. Moreover, the Complaint fails to allege a concrete, false assertion of wrongdoing on the part of the Plaintiffs. Plaintiff ORC bases its Fifth and Fourteenth Amendment claims on alleged infringement of a liberty interest in its good name. *See* Compl. at ¶ 36. As the Supreme Court repeatedly has stressed, § 1983 was not meant to federalize state tort law. *See, e.g., DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989). Accordingly, ORC's allegations of defamation under the guise of a liberty interest claim do

not constitute a constitutional violation as presented in the Complaint. *See, e.g., Van Deelen v. Shawnee Mission Unified School Dist #£512,* 316 F. Supp. 2d 1052, 1057 (D. Kan. 2004); Pl. Orig. Compl. at ¶ 23 (identifying the statement as "this *defamatory* statement") (emphasis added). Thus, the Court **DISMISSES** the due process claims advanced by ORC under the Fifth and Fourteenth Amendments.[7]

### 2. First Amendment Claims

Plaintiff ORC sues the City under 42 U.S.C. § 1983 claiming that the City's decision to award the contract to another bidder was in retaliation for exercising its First Amendment right of free speech and to petition. Specifically, Plaintiffs allege that the City violated the First Amendment by basing its decision to award UCA the construction project on the fact that ORC exercised its rights to petition the government and speak out regarding alleged official misconduct by the El Paso Lower Valley Water District ("EPLVWD") in a prior construction project in which ORC was involved.

To establish a First Amendment retaliation claim under § 1983, ORC must show (1) that it suffered an

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[7] As stated above, and reiterated again, the Court notes that Plaintiffs mention in passing an Equal Protection Claim under the Fourteenth Amendment in the Response; yet, upon careful review, the Court finds that Plaintiffs have not specifically alleged facts supporting the basis for such a claim. Although the Response uses terms like "similarly situated" and "treated differently," the Complaint fails to even hint at such an allegation. Nor does the Complaint ever mention the words "equal protection." A § 1983 plaintiff must plead specific facts, not conclusory allegations, in order to adequately state a claim, *Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985).

adverse employment action; (2) as a result of speech involving a matter of public concern; (3) that ORC's interest in commenting on the matter of public concern outweighed the City's interest in promoting efficiency, and (4) that the adverse action was motivated by the protected speech. *Foley v. Univ. of Houston Sys.*, 355 F.3d 333, 341 (5th Cir. 2003). Although ORC was not an employee of the City of Lubbock, the Supreme Court has held in the context of a pre-existing commercial relationship that an independent contractor is entitled to First Amendment protections that would be afforded to an employee. *See Bd. County Comm'rs v. Umbehr*, 518 U.S. 668, 685 (1996) (holding that an independent contractor with a pre-existing trash-hauling contract was not unlike an employee with an employment relationship and thus entitled to First Amendment protection – while specifically declining to address whether the holding would apply to contractors without a pre-existing commercial relationship). Plaintiffs argue strenuously that the *Umbehr* holding means that ORC should be treated as an employee when analyzing its retaliation claim against the City. *See* Sur-Reply at 3, 5-6. Thus, for ORC to prevail on a First Amendment retaliation claim in the employment context, as one of the elements of the cause of action it must show that the lawsuit involved a matter of public concern. *See Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir. 1999); *see generally Kirkland v. Northside Indep. Sch. Dist.*, 183 F.3d 342, 345 (5th Cir. 1999) (holding that the speech must touch upon an issue of public concern in the public employment context).

More importantly on a motion to dismiss, whether the subject matter of the prior lawsuit touches on a matter of public concern as it relates to the City and its actions is a

question of law for the court to decide. *Markos v. City of Atlanta, Tex.*, 364 F.3d 567, 570 (5th Cir. 2004). In making this determination, the court considers the content, form, and context of a given statement, as revealed by the whole court record. *Teague v. City of Flower Mound, Tex.*, 179 F.3d 377, 380 (5th Cir. 1999) (quotations omitted); *Terrell v. Univ. of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986). In evaluating the context of the speech, the Fifth Circuit has examined whether it was conveyed in the context of an employee-employer dispute. A finding that it was suggests that the speech is private. *See Teague*, 179 F.3d at 383 (holding that where a plaintiffs grievance "was made in the setting of a private employee-employer dispute," it was "more appropriately characterized as private" in context); *Bradshaw v. Pittsburg Indep. Sch. Dist.*, 207 F.3d 814, 818 (5th Cir. 2000) (holding that where speech was made after adverse decision to plaintiff, speech was "more akin to a personal grievance rather than a matter of public concern."). The Fifth Circuit has also considered the fact that speech was made outside the context of an employment dispute in reaching the conclusion that it related to a matter of public concern. *See Harris,* 168 F.3d at 222-23 (holding that speech at issue was matter of public concern where "[t]here [was] no evidence that the Plaintiffs' speech merely concerned an employment related squabble" and where "the [d]efendants did not point to any evidence of an underlying personal dispute [with] the [p]laintiffs"). The existence of an element of personal interest does not prevent a finding that the speech as a whole raises issues of public concern; but a personal conflict cannot be transformed into an issue of public concern simply by arguing that individual concerns might have been of interest to the public under different circumstances. *Bradshaw*, 207 F.3d at 816. If the Court

determines that the subject matter of the speech is not a matter of public concern, then the judicial inquiry ends. *See Davis v. Ector County*, 40 F.3d 777, 782 (5th Cir. 1994).

In this case, Plaintiffs have not pleaded that the prior lawsuit of *Oscar Renda Contracting, Inc. v. El Paso County Lower Valley Water District* involved a matter of public concern. *See* Pl. Orig. Compl. However, Plaintiffs have argued in their Response that the El Paso litigation clearly involved a matter of public concern – that the EPLVWD allegedly told ORC to violate municipal ordinances. *See* Resp. at 11-13. Plaintiffs have failed to allege facts that, when taken as true, would allow even an inference that the prior lawsuit addressed a matter of public concern to Lubbock – the relevant community.

Although the prior lawsuit is argued by Plaintiffs to have been an issue of public concern to the community of El Paso due to allegations of impropriety, the community of Lubbock is unlikely to have any concern over whether the EPLVWD allegedly requested ORC to violate certain ordinances of the City of Socorro. Plaintiffs cannot state a claim without showing a matter of public concern of relevance to Lubbock. *See Alexander v. Eeds*, 392 F.3d 138, 145-146 (5th Cir. 2004) (citing *Markos v. City of Atlanta,* 364 F.3d 567, 572 (5th Cir. 2004) (the issue needs to be an existing public issue); *see also id.* at 143 (to qualify as matter of public debate, the speech needs to be within the "backdrop of widespread debate *in the community*") (emphasis added); *Connick v. Myers*, 461 U.S. 138, 146 (1983) (the speech needs to fairly relate to a matter of political, social, or other concern to the community); *Tompkins v. Vickers*, 26 F.3d 603, 607 (5th Cir. 1994) ("Tompkins' complaints were made against a backdrop of widespread debate *in the Greenville community* regarding the art

program and other aspects of Vickers' management of the school system.") (emphasis added); *Finch v. Fort Bend Indep. Sch. Dist.*, 333 F.3d 555, 564 (5th Cir. 2003) (quoting Smith, J., dissenting in *Harris,* 168 F.3d at 226, for the proposition that the plaintiff failed to show how her speech was actually aired or considered in any widespread debate in the community); *Cabrol v. Town of Youngsville*, 106 F.3d 101, 112 (5th Cir. 1997) (the speech involved a highly significant matter of public concern *in the community where [plaintiff] resided*) (emphasis added); *Lewinsky's Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 132 (1st Cir. 1997) (using the term "relevant community").

The Court finds that the subject matter of the speech in the prior lawsuit was not a matter of public concern because it had nothing to do with a public debate in Lubbock or an existing public issue relevant to the City of Lubbock or its residents. The mere fact that the public at large might be interested in a matter by virtue of the EPLVWD's status as an arm of government is insufficient, *see Connick,* 461 U.S. at 147, especially under the circumstances alleged in Plaintiffs' Complaint.

Finally, and the Court believes most relevant to the motion at hand, ORC has failed to allege or argue within its filings how it can maintain a cause of action against the City for a First Amendment retaliation claim based upon an allegation that the City is retaliating for a lawsuit filed against a different entity. In all the cases cited by Plaintiffs and Defendants in their briefs in which a First Amendment retaliation claim against a governmental entity was at issue, the defendants in those cases were also the same general entity that the plaintiff had spoken out against on a matter of public concern. Here, however, the El Paso water district is the entity which ORC is

alleged to have spoken out against regarding a matter of public concern – yet ORC is claiming the City of Lubbock is retaliating.

Defendants also took notice of ORC's contention that the City was retaliating for "acts against an unrelated governmental entity." *See* Reply at 5. Possibly foreseeing this issue, or in response to Defendants' pointing it out, Plaintiffs included a footnote comparing a prospective employer's retaliation for the filing of an EEOC complaint against a prior employer to the issue at hand. *See* Sur-Reply at 2, n.1. However, actions brought under § 704(a) of Title VII (42 U.S.C. § 2000e-3(a)) are not properly comparable to a § 1983 claim against a governmental entity. *See, e.g., Irby v. Sullivan*, 737 F.2d 1418, 1429 (5th Cir. 1984) (violations of rights created under Title VII cannot form the basis of a § 1983 claim); *see also Grady v. El Paso Community College*, 979 F.2d 1111, 1113 (5th Cir. 1992) ("[A] violation of Title VII cannot support a § 1983 suit."). Title VII provides a statutory right based on discrimination by an employer because of a prior charge or proceeding. *See* 42 U.S.C. § 2000e-3(a). The claim of retaliation based on a prior charge is clearly a Title VII congressionally established wrong. The Fifth Circuit has stated that "[a] person cannot be penalized for resorting to the legal procedures *that Congress has established* in order to right *congressionally recognized* wrongs." *East v. Romine, Inc.*, 518 F.2d 332, 340 (5th Cir. 1975), *reversed on other grounds by* 647 F.2d 513 (5th Cir. 1982) (emphasis added). "Therefore, the rights created by section [§ 2000e-3(a)] may not be asserted within the remedial framework of section 1983." *Irby*, 737 F.2d at 1428.

Another and highly related issue becomes relevant in circumstances such as this case presents – where the

offeror is suing a municipality for alleged First Amendment retaliation premised on the offeror's prior suit against a completely different municipality. As a matter of law, ORC cannot maintain a claim for retaliation against the Defendants for a lawsuit involving the El Paso water district. The Third, Eleventh, and Second Circuits, as well as district courts in the First, Third, and D.C. Circuits, have recognized an important requirement that a plaintiff have some sort of a pre-existing commercial relationship with a governmental entity before the plaintiff can sue the entity as a disappointed bidder. *See McClintock v. Eichelberger,* 169 F.3d 812 (3d Cir. 1999), *cert. denied,* 528 U.S. 876 (1999); *Webster v. Fulton County,* 283 F.3d 1254 (11th Cir. 2002) (recognized that the First Amendment did not allow a disappointed bidder without pre-existing relationship to bring a claim but did allow a § 1981 claim under the circumstances); *Housing Works, Inc. v. Giuliani,* 2003 WL 56921, at *2 (2d Cir. Jan. 3, 2003) (recognizing that the Supreme Court limited its holding to plaintiffs with a pre-existing relationship); *Ervin v. Dunlap,* 33 F. Supp. 2d 1, 7 (D.D.C. 1997) (held that First Amendment protections may not apply to bidders of a potential contract); *Prisma Zona Exploration de Puerto Rico, Inc. v. Calderon,* 162 F. Supp. 2d 464, 474 (E.D. Pa. 1999) (relying on *McClintock,* the court refused to extend First Amendment protection to contractor lacking pre-existing relationship but determined that plaintiff would not be entitled to relief regardless); *Allstate Transp. Co., Inc. v. Southeastern Pa. Transp. Auth.,* 2000 WL 329015 at *20 (E.D. Pa. Mar. 27, 2000) ("for independent contractors, any such protections are limited to cases in which the public entity terminates an

existing, ongoing relationship in retaliation for the contractor's exercise of First Amendment rights").[8]

Plaintiffs argue that "neither the Fifth Circuit nor the Supreme Court have held that a pre-existing relationship is required." *See* Sur-Reply at 7. The Court notes, however, that the Supreme Court and the Fifth Circuit have not held that a pre-existing relationship is not required. The Court believes that, under circumstances such as those presented in the instant case, for Plaintiffs to assert a retaliation claim against the City of Lubbock based on a lawsuit against the EPLVWD, a pre-existing commercial relationship with the City of Lubbock is required. Without such a relationship, ORC's claim of retaliation is too tenuous given that Plaintiff is attempting to sue an entity that is different from the one it spoke out against.

In essence, ORC is asking this Court to extend First Amendment protections to disappointed bidders that have no pre-existing relationship with a defendant. ORC asks this Court to go beyond the boundary the Supreme Court

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[8] Plaintiffs place great reliance upon the Sixth Circuit case of *Lucas v. Monroe County*, 203 F.3d 964 (6th Cir. 2000), for the premise that First Amendment protections should apply to contractors without pre-existing relationships. However, upon close review of the case, the Court notes that in *Lucas*, the independent contractor was already on a "stand-by list." As such, the contractor did have some pre-existing relationship and thus a sufficient benefit to create protections. *See id.* at 972. Even *Blackburn*, 42 F.3d 925, was based upon facts distinguishable from the ones at issue here. In *Blackburn*, the plaintiff's permission to use the police radio frequency was *revoked* and he was removed from his *pre-existing* placement on a rotational call list. *See id.* Moreover, the Supreme Court cases cited by Plaintiffs in the Sur-Reply for the proposition that First Amendment protections extend to independent contractors all involved plaintiffs with some form of pre-existing relationship.

declined to breach in *Umbehr* and continued to leave in place by subsequently denying writs of certiorari on the issue. This the Court will not do, especially under the facts of this case as alleged by the Plaintiffs, where the claimed retaliation is for a suit against a different party than the City of Lubbock and advanced by a disappointed bidder with no property rights in the contract. Thus, the Court **DISMISSES** ORC's First Amendment retaliation claim premised on the prior litigation with the EPLVWD because, when the facts alleged in Plaintiffs' Original Complaint are taken as true, ORC has failed to state a claim for which relief may be granted.[9]

## B. TEXAS LOCAL GOVERNMENT CODE CLAIMS

Plaintiffs have brought a claim for injunctive relief premised on section 252.061 of the Texas Local Government Code and for a declaratory judgment pursuant to the Texas Declaratory Judgment Act, stating that Defendants violated chapter 252 of the Texas Local Government Code. Even though the crux of Plaintiffs' case is more rightly defined as an action to determine whether ORC was in fact the lowest "responsible" bidder rather than a lawsuit premised on constitutional violations, because the Court

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[9] Plaintiffs also claim that Defendants retaliated against ORC for its exercise of its right to petition, but the public concern requirement also applies to the right to petition. *See Martin v. City of Del City,* 179 F.3d 882, 887 (10th Cir. 1999) (simply claiming a denial of access to the courts is not, in and of itself, a constitutionally protected activity; rather, the Petition Clause requires that one's petition must comment upon matters of public concern). The Complaint fails to allege any facts of how the right to petition was infringed. A § 1983 plaintiff must plead specific facts, not conclusory allegations, in order to adequately state a claim. *Elliott v. Perez,* 751 F.2d 1472, 1479 (5th Cir. 1985).

has determined that Plaintiffs' Original Complaint has failed to state a claim brought under 42 U.S.C. § 1983, the Court need not maintain and exercise its pendent jurisdiction over the state law claims. Plaintiffs' state law claims are hereby **DISMISSED** without prejudice so that they may be re-filed in the proper state court.

## V.
## CONCLUSION

Because Plaintiff Rudolph J. Renda has agreed to not pursue any claims against Defendants, the claims of Plaintiff Rudolph J. Renda are **DISMISSED**.

For the reasons stated above, Defendants' Motion to Dismiss is **GRANTED in part** and **DENIED in part**. Plaintiffs' constitutional claims are **DISMISSED** with prejudice. The Court declines to exercise its pendent jurisdiction over Plaintiffs' state law claims, which are **DISMISSED** without prejudice All relief not expressly granted is denied.

SO ORDERED this 6th day of May, 2005.

/s/ Sam R. Cummings
SAM R. CUMMINGS
UNITED STATES DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 05-10836

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OSCAR RENDA CONTRACTING INC; ET AL

Plaintiffs

OSCAR RENDA CONTRACTING INC; JOHN C BECK

Plaintiffs-Appellants

v.

THE CITY OF LUBBOCK TEXAS; MARC MCDOUGAL, in his official capacity as Mayor for injunctive relief

Defendants-Appellees

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Appeal from the United States District Court for the Northern District of Texas, Lubbock

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**ON PETITION FOR REHEARING**

(Filed Oct. 12, 2006)

Before DAVIS, BARKSDALE and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge